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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 345

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, Sued in the Name of the UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION
Petitioner

against

P. LEROY HARWOOD, as Trustee in Bankruptcy of Groton Iron Works, and ISAAC SIEGEL and JOHN M. P. THATCHER, as Ancillary Receivers of United States Steamship Company, Intervenors
Respondents

Supplemental Brief Submitted in Behalf of Respondents, Isaac Siegel and John M. P. Thatcher, as Ancillary Receivers of United States Steamship Company

W. H. L. EDWARDS
RICHARD S. HOLMES
Counsel for Respondents Isaac Siegel and John M. P. Thatcher, as Ancillary Receivers of United States Steamship Company

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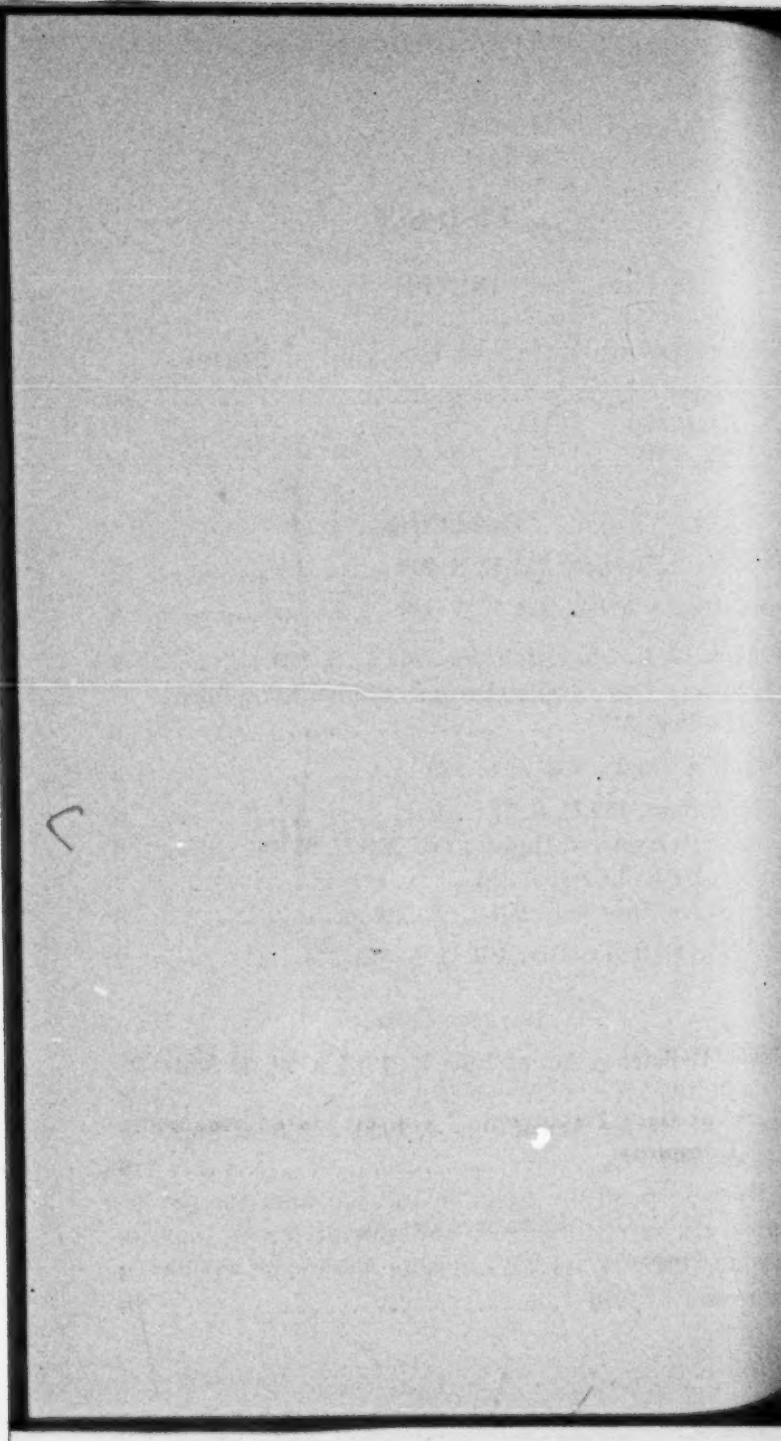

IN THE

Supreme Court of the United States

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, Sued in the Name of the UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, *Petitioner,* *against* P. LEROY HARWOOD, as Trustee in Bankruptcy of Groton Iron Works, and ISAAC SIEGEL and JOHN M. P. THATCHER, as Ancillary Receivers of United States Steamship Company, Intervenors, *Respondents.*	October Term, 1929. No. 345.

Supplemental Brief Submitted in Behalf of Respondents, Isaac Siegel and John M. P. Thatcher, as Ancillary Receivers of United States Steamship Company.

These respondents adopt in full the brief for the respondents heretofore filed, and submit for the consideration of the Court the following additional matters.

I.

It is urged under the first point of petitioner's brief that in executing the contracts here involved and in particular the contract of March 26, 1920, the Fleet Corporation was acting as the agent of a disclosed sovereign principal. In determining who are the parties to a contract the intention of the parties must govern. This intention must be discovered from the wording of the instrument itself, or if that is ambiguous from all of the surrounding circumstances. It is submitted that in the case of the contract of March 26, 1920, the wording shows clearly that the Fleet Corporation, and not the United States, was the party contracting with Groton Iron Works, and this conclusion is confirmed by consideration of the wording of the contracts to which this contract is supplemental. If, however, there should be any doubt on this point, the attention of the Court is invited to the provisions of the other agreements executed by the parties in immediate connection with the contract of March 26, 1920.

In section (c) of Article II of the contract of March 26, 1920 (R. 77), it is provided as one of the bases of the contract that the mortgages held by the Fleet Corporation on the plant of Groton should be extended until July 1, 1921. Accordingly an extension agreement dated March 25, 1920 (Defendant's Exhibit D, R. 220), was executed between the Fleet Corporation and Groton, in which no mention is made of the United States. This agreement recites (R. 220) loans and advances by the Fleet Corporation to Groton of $1,800,000, which amount had been reduced by the application and credit of a certain portion of the contract price for the construction of the steamship "Tollard" by Groton for the Fleet Corporation. It further recites the receivership of Groton, the desire of

Groton to resume possession of its property, its representation that this cannot be done without the extension of the mortgages and the willingness of the Fleet Corporation to cooperate, and provides that the Fleet Corporation extends and postpones the maturity of the principal sum due on the mortgages until July 1, 1921 (R. 221). In this extension agreement the Fleet Corporation is clearly the principal. It is not even recited as representing the United States. Surely, if the contract of March 26, 1920, was between Groton and the United States, the Fleet Corporation in this closely related extension agreement would never have contracted as principal in such unqualified fashion.

The uncontradicted evidence shows that the contract of March 26, 1920, was not carried out in accordance with its terms. Instead within a month of its execution, a new arrangement was made by which the Fleet Corporation withdrew the application which it had made for a new receivership and continued to advance the funds necessary for the payrolls and the purchase of materials. This new arrangement is evidenced by a memorandum (R. 143) prepared by Mr. Gillen and approved by Mr. Nottingham, counsel for the Fleet Corporation, and signed by Messrs. Gillen, Nottingham and Dean (R. 144). A copy of this memorandum was delivered to Groton (R. 140). No mention is made therein of the United States. The memorandum speaks of the adjustment of the disputes between the Fleet Corporation and Groton, and states that the signers are of the opinion the guarantee of performance by Virginia Shipbuilding Corporation "more than amply protects the Emergency Fleet Corporation" (R. 144).

This memorandum resulted in a formal resolution of the Fleet Corporation on April 29, 1920 (Defendant's Exhibit S, R. 232). This resolution commences:

> "Whereas the Fleet Corporation has a contract with the Groton Iron Works of March 26, 1920, to provide working ship construction funds to the extent of $16,155,648, and in addition thereto agrees to give a credit of one-half million dollars under terms to said corporation, together with ship property and materials in the value of $325,000; * * *."

The resolution then directs an advance to Groton of $1,000,000, and provides:

> "* * * that this advance shall be made only upon the condition that the same shall not prejudice the rights of the Fleet Corporation under the contract of March 26, 1920, * * *."

There is no reference here to the United States. The language of all of these documents is the language of lawyers who must have realized the difference between the Fleet Corporation contracting as a principal and the Fleet Corporation contracting solely as an agent of the United States.

These considerations dispose effectively of the contention of petitioner under its second point that the contract of March 26, 1920, effected a novation by which the Fleet Corporation was relieved of liability on its previous contracts and the United States was substituted in its place. A novation is unusual and the requisites therefor are correctly stated at page 33 of petitioner's brief. If a novation had been intended it is inconceivable that within a month after the execution of the contract, an attorney for the Fleet Corporation (the party claiming to be relieved) should describe the contract as one between the Fleet Corporation and Groton to provide working ship construction funds. This argument must be deemed an afterthought, entirely foreign to the actual intention of the parties to the contract.

II.

In support of its contention that the contract of March 26, 1920, was made between the United States and Groton and not between the Fleet Corporation and Groton, petitioner relies strongly upon the use of the words "just compensation" in paragraphs (1) and (2) of Article III (R. 78, 79) of the contract of March 26, 1920. The argument seems to be that since upon the cancellation of a contract under the powers conferred on the President by the Emergency Shipping Fund provisions of the Act of June 15, 1917 (c. 29, 40 Stat. 182, 183), the contractor was entitled to just compensation, to be determined by the President, and that the payment thereof was an obligation of the United States, the Fleet Corporation in executing the contract was providing for the discharge of an obligation of the United States and therefore must have acted as its agent. Since there is no evidence that the President ever determined the just compensation to be paid to Groton for the cancellation of any of its contracts, this argument rests upon the assumption that the Fleet Corporation not only had the Presidential power of cancellation, but also the Presidential duty of determining just compensation. The duty of determining just compensation is imposed on the President by the third paragraph of the Act of June 15, 1917 (c. 29, 40 Stat. 183). It is distinctly a duty, and not a power, and therefore could not be delegated under the provisions of the fourth paragraph which provides only for the delegation of the "power and authority" vested in him by that Act. What this "power and authority" is appears from the first paragraph by which the President is "authorized and empowered" to do the specific things described in the following five subdivisions.

This is all that can be delegated under the fourth paragraph. Neither the Executive Order of July 11, 1917, nor the Executive Order of December 3, 1918, attempts to impose the performance of the duty of determining just compensation on the Fleet Corporation, nor so far as appears has the Fleet Corporation ever assumed to make such determination. Petitioner's argument therefore fails completely. The Fleet Corporation could not have been discharging the obligation of the United States, since that obligation was to make just compensation to be determined by the President, and the Fleet Corporation was never authorized to make this determination or to discharge this obligation.

It did have the right, however, as one party to a contract to cancel or modify the same and to provide by agreement with the other party for the payment of compensation for damages for such modification or cancellation. This right it exercised in the contract of September 30, 1918 (R. 44), which states in the preamble that it is the desire of both parties to alter the contract of June 15, 1917 (R. 36), "for the purpose of effecting a cancellation by agreement of the construction of four of said hulls." Paragraph (e) of Article II of the contract of March 26, 1920, provides for just such a "cancellation by agreement." This was within the power of the Fleet Corporation as party to the contract, whereas the determination of just compensation for a cancellation by the United States was not. It should be noted that this paragraph reads that "all obligations of the owner to the contractor or to the receivers, arising out of the suspension and cancellation of the three hulls, 10 to 12, inclusive, under contract 225 S. C. are settled and adjusted at the amount of $500,000, * * *" (R. 77). In Article III Groton accepts this sum and the property specified for the suspension

and cancellation of contract 15 W. H. as "just compensation and in accord and satisfaction for said suspension and cancellation" (R. 78, 79). This is the language of an ordinary contractual cancellation. It does not mention the United States, and the fact that Groton agrees that the compensation is "just" is not a recognition that the Fleet Corporation was performing the Presidential duty of awarding just compensation under the Emergency Shipping Fund provisions of the Act of June 15, 1917.

III.

Petitioner's argument under the third point of its brief, that the Merchant Marine Act of June 5, 1920 (c. 250, 41 Stat. 988, 989), provides an exclusive remedy against the United States for the enforcement of contracts made by the Fleet Corporation prior to its enactment, ignores certain well-established rules of statutory construction. Petitioner's construction makes the Act operate retrospectively, and takes away rights already vested, substitutes new remedies and imposes new obligations in respect to matters which had been done in the past. Such a construction will not be adopted unless the words of the statute "are so clear, strong and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." *United States* v. *Heth*, 3 Cranch, 399, 413.

As this Court said in *White* v. *United States*, 191 U. S. 545, at page 552:

> "Where it is claimed that a law is to have a retrospective operation, such must be clearly the intention, evidenced in the law and its purposes, or the court will presume that the lawmaking power is acting for the future only and not for the past; that it is enacting a rule of conduct which shall

> control the future rights and dealings of men, rather than review and affix new obligations to that which has been done in the past."

To the same effect are *United States* v. *Burr*, 159 U. S. 78, 82-83; *Shwab* v. *Doyle*, 258 U. S. 529, 534; *Llewellyn* v. *Frick*, 268 U. S. 238, 252.

Petitioner's construction likewise renders the statute of doubtful constitutionality not only under the Fifth Amendment as depriving Groton and other contractors with the Fleet Corporation of rights acquired against the Fleet Corporation under the contract, without due process of law, but also under the Seventh Amendment as depriving such contractors of the right to a trial by jury of the issues involved in any action at common law for breach of the contract and substituting in place thereof an action in the Court of Claims against the United States.

This Court said in the case of *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, at page 390:

> "But, as this Court often has held, 'a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.' *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407-408; *Baender* v. *Barnett*, 255 U. S. 224."

In the case at bar it is quite unnecessary to construe the statute as providing that after its enactment all suits against the Fleet Corporation arising out of prior contracts are abolished and that the only remedy of an aggrieved contractor is by suit against the United States in the Court of Claims. Section 2 (b) (2) of the Act specifically preserves the "remedies" accruing or accrued as a result of any prior contract or agreement. Nothing could

show more clearly the Congressional intent that a contractor was not to be deprived of his right to trial in the District Court on a contract made with the Fleet Corporation as principal by reason of the change in the powers and status of the Fleet Corporation contemplated by that Act. Even without the aid of the principles of statutory construction above referred to this would be sufficient to preserve the right of Groton to maintain this suit. With the aid of these principles this conclusion cannot be escaped.

Petitioner relies upon the fact that this section provides that these rights, interests and remedies "may be exercised and enforced in like manner, subject to the provision of subdivision (c) of this section, as if this Act had not been passed." It is difficult to see how this provision in any way changes the obvious meaning of the foregoing words. Subdivision (c) simply provides that the Shipping Board shall in the future adjust, settle and liquidate all matters arising out of the exercise by the President of any of the powers or duties conferred or imposed upon him by any of the preceding acts, and transfers to the Shipping Board the duty of making awards of just compensation, reserving to any dissatisfied person the right to litigate the propriety of an award made by the Board the same as if it had been made by the President.

The effect of this section was considered in the case of *Providence Eng. Corp.* v. *Downey Shipbuilding Corp.*, 294 Fed. 641 (certiorari denied 264 U. S. 586), in which it is said at page 657:

> "Subdivision (c) has no bearing upon the question now being discussed. It relates to the liquidation of matters incident to the exercise by or through the President of the powers conferred or duties imposed upon him by any of the acts or parts of acts repealed."

This section has therefore no possible bearing on the question of the right of Groton to maintain this action. Here there was no question of an award by the President or by the Shipping Board or of adjustment, settlement, or liquidation by the Board of matters arising out of the powers and duties of the President under the former acts. The only question here is the liability of the Fleet Corporation to account under a series of contracts made by it as principal before the Act in question was passed. To say that a statute regulating the future powers and duties of the Shipping Board somehow relieves the Fleet Corporation of this obligation is not to construe but to rewrite the statute.

For all of the reasons set forth above and in the brief heretofore filed it is submitted that the judgment of the Circuit Court of Appeals for the Second Circuit should be affirmed.

April, 1930.

Respectfully submitted,

W. H. L. EDWARDS,
RICHARD S. HOLMES,
Counsel for Respondents Isaac Siegel and John M. P. Thatcher, as Ancillary Receivers of United States Steamship Company.